PUBLIC PROSECUTOR v. TAN ANN CHUAN & 30 ORS.

[A.Cr.J. (Ajaib Singh J.) June 10, 1978]
[Seremban — Criminal Appeal No. 17 of 1977]

Gaming — Gambling in club premises — Arrest of 31 persons including 3 persons waiting for membership approval — Forfeiture of articles recovered from table and drawers — Whether club was a common gaming house — Acquittal of respondents — Appeal against acquittal — Cross-appeal against forfeiture — Common Gaming House Ordinance, 1953, ss. 4(1)(b), 6(1), 16(2) & 19.

Clubs — Sports club — Premises used by members to gamble habitually — Whether club a common gaming house — Common Gaming Houses Ordinance, 1953, ss. 4(1)(b), 6(1), 16(2) & 19.

In this case, a police raid had taken place at the premises of the Negri Sembilan Chinese Recreation Club (hereinafter called the club) pursuant to information received that gaming was taking place in the club premises. Altogether thirty one people were found gambling with instruments and appliances for the game of *pai kow* (card game). They were arrested. While the police were in the room, the secretary general of the club turned up and enquired whether the police had a search warrant. The search warrant was shown to him and he too was arrested. Three of the thirty one persons arrested were waiting for approval of their membership. In the meanwhile, they were allowed to use the facilities of the club under the club's rules and by-laws.

The main object of the club was to sponsor sports. It provided for its members outdoor games as well as indoor games such as billiards, mahjong, gin rummy and *pai kow*.

The learned magistrate held that the prosecution had failed to prove that gambling was the primary object of the club and he acquitted and discharged all the accused persons. However, he ordered forfeiture of all articles recovered from the table and drawers. The prosecution appealed against the acquittal and the respondents cross-appealed against the said forfeitures.

Held, dismissing the appeal and allowing the cross-appeal:
(1) before the presumption under section 19 could arise it must be proved that the entry on the premises was effected in strict compliance with the provisions of the Ordinance;

(2) an ordinary social club would not become a common gaming house merely because facilities were provided for its members to gamble even habitually at the premises. It was only when a club or any premises were being used primarily for the purpose of gambling that the club or the premises became a common gaming house;

(3) the forfeiture provisions of section 16(2) of the Common Gaming Houses Ordinance were mandatory but before they could be invoked there must be a specific finding by the trial court that the premises concerned were used or kept as a common gaming house. The learned magistrate having found that the club was not a common gaming house his order of forfeiture of the articles found on the table and drawers was clearly wrong.

CRIMINAL APPEAL

Razalli bin Hassan (Deputy Public Prosecutor) for the appellant.

Dato' Wong Seng Chow (*Vincent Paul Raj* with him) for the respondents/appellants in cross-appeal.

Cur. Adv. Vult.

Ajaib Singh J.: This is an appeal by the Public Prosecutor against the decision of the learned Magistrate whereby he had acquitted and discharged 31 accused persons who were charged with gaming in a common gaming house under section 6(1) of the Common Gaming Houses Ordinance and against the acquittal and discharge of the General Secretary of the Negeri Sembilan Chinese Recreation Club who was charged with permitting the Club premises to be used as a common gaming house contrary to section 4(1)(b) of the same Ordinance. There is also a cross-appeal by the General Secretary against the learned Magistrate's order forfeiting the exhibits which were recovered from a table and its drawers.

The facts of this case are briefly as follows. On September 18, 1976 a police party headed by the O.C.C.I. Supt. Sarjeet Singh Dhaliwal raided the Negeri Sembilan Chinese Recreation Club armed with a search warrant. On the first floor of the Club the police party went to the rear portion which was partitioned by a glass screened wall and beyond this was a further partition making one-third of the partition into an air-conditioned room. A few persons were sitting outside the partition. Inside the partitioned room the police party found a large number of people gathered round a long table. The police noticed that gambling was going on with instruments and appliances for the game of pai kow. The O.C.C.I. introduced himself and the members of his party and instructed the people not to move. Various exhibits were recovered and search lists made out. Altogether 31 people found in the room were arrested. While the police were in this room the General Secretary of the Club turned up and enquired whether the police had a search warrant. The search warrant was shown to him and he too was placed under arrest. Three of the 31 persons arrested in the room were not approved members of the Club. Their applications for membership were being considered by the Committee of Management but meanwhile they were allowed to use the facilities of the Club under the Club's rules and bylaws.

Ten days before this police raid Supt. Sarjeet Singh Dhaliwal had received information which he recorded on oath whereupon he caused an observation to be kept on the premises of the N.S.C.R.C. As a result of the observations kept by police personnel he prepared a search warrant on September 18, 1976 addressed to himself and other police officers to conduct a search on the premises which was carried out at about 10.45 p.m. the same night. The information which was received by the O.C.C.I. concerning the Club was that gambling was going on at the premises. During the raid at the Club the police did not search the ground floor which accommodated a billiards room and badminton courts. At the entrance there were two signs indicating that only members were allowed into the premises.

Evidence was also adduced to the effect that Tan Chin Beng the Secretary of the N.S.C.R.C. released a press statement which was published in the press concerning the police raid on the Club premises. This press release dated March 4, 1977 lamented the fact that after the police raid the N.S.C.R.C. was forced to stop gambling at the premises and with this stoppage the Club had lost the main source of revenue by way of taxes on gambling and this would now curb the Club's activities as well as the giving of aid of various kinds to organisations and to the promotion of sports in the State. The Secretary was questioned over this press release by the Committee of Management of the N.S.C.R.C. and a vote of censure was passed against him.

According to the evidence of Lim Kee Siong, a member of the N.S.C.R.C. for about 50 years and its President for the last 30 years, the main object of the Club was to sponsor sports and to this end the Club provided for its members such games as soccer, rugby, tennis and athletics. The Club had indoor games also such as badminton, billiards, mahjong, gin rummy and *pai kow*. Gaming had been carried on at the premises for the last 50 years on the first floor but non-members were not allowed to take part.

Lim Kee Siong had himself played football for the State and had been State Captain for many years as well as the Captain of the N.S.C.R.C. football team.

Except for the hall which was loaned out to organisations the other facilities of the N.S.C.R.C. were for members only. The N.S.C.R.C. had two tennis courts and three badminton courts and the All-Malayan Badminton Championships for 1977 were scheduled to be held in June at the Club premises.

The Club had about 800 members of which only four or five per cent indulged in gaming. Tax from gaming was not the only source of revenue but it was a major source of revenue. The Club also had two jack-pot machines under licence for the exclusive use of members. Other sources of revenue were the entrance fees and subscriptions and from the hire of the indoor stadium to various organisations. September 18, 1976 was the first time that the police had ever raided the Club. The Club was a properly registered Club with proper rules and bylaws. It had no secret passage or stairway. The pai kow room had no facilities for escape. There was no other way besides the common staircase to the first floor gaming room. The membership of the Club was open to all including government servants and police officers. Non-members were not allowed into the premises. There had been occasions when the Secretary telephoned the police and had trespassers removed from the Club. A small percentage of members played games of chance in the Club and some of them did so habitually but they were only a minority of members. Taxes were levied on the games like gin rummy, mahjong, pai kow and other games of chance.

The principal source of revenue was taxes for games of chance and one-armed bandit machines. Subscriptions and other revenue were not as substantial as revenue from the games of chance. This small percentage of members who gambled contributed towards the benefits of the larger percentage of the membership. Student members and sporting members were not allowed to gamble in the Club. At the premises there was an office, a T.V. room, a rest room, a hall and a conference room which were all air-conditioned as well as a billiards room and a dormitory. The Club ran a weekly ballet class and it also had a library. The Club had also been giving scholarships during the past four years to Malay and Chinese schools.

Expert evidence on the game of pai kow was given by Kong Fook Yew from the C.I.D. Police Headquarters, Kuala Lumpur. This evidence was not seriously challenged by the defence as it was conceded that this game was in fact being played at the Club.

At the close of the case for the prosecution a submission of no case to answer was made by the defence and after hearing the submissions by the defence and the reply by the prosecution the learned Magistrate held that the prosecution had failed to make out a *prima facie* case on either of the two charges and he accordingly acquitted and discharged all the accused persons. With regard to the exhibits which were recovered the learned Magistrate ordered that all articles recovered from the table and from the drawers were to be forfeited but articles recovered from the accused persons themselves were to be returned to them and articles recovered from the office were to be returned to the N.S.C.R.C.

In his grounds of decision the learned Magistrate stated that after considering the evidence adduced by the prosecution he was satisfied that the entry to the premises was properly made under the provisions of the Common Gaming Houses Ordinance and therefore the statutory presumption under section 19 arose. He however held that on the evidence before him the defence had through cross-examination of the prosecution witnesses succeeded in rebutting the statutory presumption. The learned Magistrate observed that of the 31 accused persons arrested on the night of September 18, 1976 28 were members of the Club while the remaining 3 had applied to be admitted as members but their applications had been deferred for consideration by the Committee. Such applicants were designated as visiting members under the rules of the Club who may use Club facilities.

The learned Magistrate also held that under the second limb of the definition of a common gaming house the prosecution had failed to prove that gambling was the primary object of the Club. In the event he held that the presumption raised under section 19 had been rebutted and he accordingly acquitted and discharged all the accused persons. He also ordered that all the exhibits recovered from the accused persons as well as the documents recovered from the office of the N.S.C.R.C. be returned. However he ordered the forfeiture of the exhibits found on the table and from inside the table drawers under section 16(2) of the Common Gaming Houses Ordinance.

On appeal before me the learned Deputy Public Prosecutor submitted that the learned Magistrate was wrong in acquitting and discharging the respondents. He submitted that of the 31 accused persons 3 were not full-fledged members of the Club and therefore they should have been treated as non-members and therefore as members of the public. It was also submitted that these three people came within the definition of a class of the public as stated in section 2 of the Common Gaming Houses Ordinance. It was submitted by the learned Deputy Public Prosecutor that there was sufficient evidence of habitual gaming going on in the air-conditioned room of the premises. The primary purpose of the N.S.C.R.C. was gambling and that was the test to be applied in this case. He referred to the press release of the Secretary in support of his contention that gambling was the primary object of the N.S.C.R.C.

The learned Deputy Public Prosecutor submitted further that the Club might have started as a recreation club but as time passed it became a gambling casino

as the exhibits recovered showed that the value of stakes amounted to well over $13,000. It was submitted that the presumption having been invoked under section 19 of the Ordinance the learned Magistrate erred in holding that the presumption had been rebutted as he did not go into the details of the prosecution case. He submitted that the prosecution was not only relying on the presumption but had gone further by observing the place for several days and there was also the evidence of the press release by the Secretary of the Club. There was sufficient evidence to establish a *prima facie* case and the defence should have been called against all the accused persons.

Dato' Wong Seng Chow for the respondents submitted that the conditions under section 19 of the Ordinance were not complied with and therefore the presumption did not arise. He submitted that the entry into the premises was not made in accordance with the provisions of the Ordinance. The information which was received by the O.C.C.I. was to the effect that gaming was taking place in the premises and not that the premises were being used as a common gaming house. The presumption did not therefore arise that the place was kept as a common gaming house.

It was submitted that the learned Magistrate had come to the right conclusion after he had considered the evidence of the President of the N.S.C.R.C. which clearly showed that gaming was not primarily carried on at the Club but was only one aspect of the various social and sporting activities carried on at the Club. With regard to the three non-members it was submitted that although their applications for membership had not been approved they had been afforded the facilities to use the Club under the rules of the Club. The press release, Dato' Wong Seng Chow submitted, was negative evidence and did not prove anything against the Club. N.S.C.R.C. was a social Club and gaming carried on there was one part of the activities of the Club.

On the cross-appeal Dato' Wong Seng Chow submitted that the learned Magistrate's interpretation of section 16(2) of the Common Gaming Houses Ordinance was incorrect. The learned Magistrate having found that the premises were not a common gaming house the order of forfeiture of articles found on the table and in the drawers was wrong.

The law on the applicability of the presumptive section 19 of the Common Gaming Houses Ordinance is well-settled. Before the presumption under section 19 can arise it must be proved that the entry on the premises was effected in strict compliance with the provisions of the Ordinance. In the present case Dato' Wong Seng Chow submitted that the O.C.C.I. Supt. Sarjeet Singh Dhaliwal had merely said in evidence that he had received information on oath that gambling was going on at the N.S.C.R.C. whereas under the provisions of the Ordinance the information upon which the O.C.C.I. acted should have been that of a place kept or used as a common gaming house.

I agree with Dato' Wong Seng Chow on the interpretation of section 19 of the Ordinance. If the evidence of the O.C.C.I. who signed the warrant of search was merely that he received information on oath that gambling was going on at the premises then the provisions of the Ordinance would not have been strictly complied with and in that event the presumption under section 19 would not have been available to the prosecution. However Dato' Wong Seng Chow appears to have overlooked the contents of the warrant itself which was accepted in evidence in the lower court and which is to the effect that the O.C.C.I. was satisfied upon written information on oath that there was good reason to believe that the N.S.C.R.C. was kept or used as a common gaming house. In the light of this evidence I do not think there is any substance in this submission by Dato' Wong Seng Chow.

The presumption having arisen against the accused the prosecution was thereafter relieved from adducing positive evidence that the N.S.C.R.C. was kept or used as a common gaming house and in terms of section 19 of the Ordinance the onus fell on the defence to prove that the N.S.C.R.C. was not a common gaming house. The learned Magistrate took the view that on the evidence before him the defence had by way of cross-examination of the prosecution witnesses and by reasonable inferences drawn from the prosecution evidence succeeded in rebutting the presumption.

After perusing the appeal record carefully I have come to the conclusion that the learned Magistrate was perfectly entitled to take the view which he did that the defence had rebutted the presumption which arose against them under section 19 of the Ordinance. A common gaming house is defined to include any place kept or used for gaming to which the public or any class of the public has or may have access and any place kept for habitual gaming, whether the public or any class of the public has or may have access thereto or not, and any place kept or used for the purpose of a public lottery. The prosecution in this case contended first that apart from the presumption under section 19 there was sufficient evidence to prove that the public had access to the N.S.C.R.C. which was used for gaming because of the three non-members who were found gaming in the premises when the police raided the N.S.C.R.C. Secondly the prosecution contended that under the second limb of the definition of a common gaming house the prosecution had proved that habitual gaming was being carried on at the premises and it did not matter under this second limb whether the public had access to it or not. All the prosecution had to prove under the second limb was that habitual gaming was being carried on at the Club.

I agree with the prosecution insofar as the interpretation of a common gaming house is concerned but I do not agree that on the evidence adduced the prosecution had established that the N.S.C.R.C. is a common gaming house. Of the 31 persons arrested that night 28 were members while the remaining 3 were designated as visiting members pending consideration of their applications for membership. Under the Club rules and bylaws these 3 persons were entitled as visiting members to make use of the Club facilities including that of gambling. On this evidence the contention of the prosecution that these three persons constituted the public or a class of the public cannot be sustained. To all intents and purposes they were members of the Club.

With regard to the second limb of the definition of a common gaming house a club or any premises for that matter will become a common gaming house even if the public is not allowed into the premises if the place is kept primarily for the purpose of gaming. An ordinary social club will not become a common gaming house merely because facilities are provided for its members to gamble even habitually at the premises. It is only when a club or any premises are being used primarily for the purpose of gambling that would make the club or the premises a common gaming house. It is necessary therefore to consider the activities of the N.S.C.R.C. The President of the N.S.C.R.C. had said in evidence that the main object of the Club was to sponsor sports such as soccer, rugby, tennis, athletics and indoor games such as billiards, badminton and mahjong and gaming such as gin rummy and pai kow. All these games and activities were being carried on by the Club. It is true that a substantial amount of revenue did come from gaming but this cannot be the sole criterion in deciding whether the N.S.C.R.C. is a social and recreational club which allows facilities for gambling for its members or whether it is a common gaming house. All the other activities of the Club have got to be taken into account. The press release by the Secretary of the Club therefore does not aid the prosecution case for it merely stresses the financial aspect of the Club and does not go to any proof that gaming is primarily carried on at the premises especially in the light or the evidence that a host of social and sporting activities are also being carried on at the Club.

I agree entirely with the findings of the learned Magistrate and with his decision to acquit and discharge all the accused persons. I also agree with his order that all exhibits taken from the accused persons and from the office of the N.S.C.R.C. be returned. However I do not agree with his order of forfeiture of the exhibits taken from the table and drawers. The learned Magistrate obviously felt that he was empowered and indeed obliged to order the forfeiture of these exhibits under the provisions of section 16(2) of the Common Gaming Houses Ordinance which is to the effect that all instruments or appliances for gaming, securities for money and other articles found in a common gaming house or on any persons found therein or escaping therefrom and which the Magistrate is of opinion were used or intended to be used for any game or lottery shall be declared by him to be forfeited. The forfeiture provisions of section 16(2) are mandatory but before they can be invoked there must be a specific finding by the trial court that the premises concerned were used or kept as a common gaming house. Here the learned Magistrate having found that the N.S.C.R.C. was not a common gaming house his order of forfeiture of the articles found on the table and drawers was clearly wrong.

The appeal by the Public Prosecutor is dismissed. The cross-appeal is allowed and I direct that all the exhibits recovered from the table and drawers be returned to the N.S.C.R.C.

Appeal dismissed; Cross-appeal allowed.

Solicitors: *Shearn, Delamore & Co.*

LO KIM PENG & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) June 21, 1978]

[Sabah — Criminal Appeals Nos. 24 to 28 of 1977]

Fisheries — Fishing with a trawl net within prohibited limits — Charge for contravening reg. 4(3) of Fisheries Regulations, 1964 — Plea of guilty — Appeal — Magistrate failed to comply with s. 173(b), C.P.C. — Fisheries Act, 1963, ss. 15 & 19 — Fisheries Regulations, 1964, regs. 4 & 9 — Criminal Procedure Code, s. 173(b).

Fisheries — Licensing officers had no authority to issue licence — Conviction under reg. 9 of Fisheries Regulations, 1964 quashed — Fisheries Act, 1963, ss. 2 & 23.

Criminal Law and Procedure — Plea of guilty — Failure to ascertain whether accused understood nature and consequences of plea and admitted offence without qualification — Effect of — Criminal Procedure Code, s. 173(b).

There are five appeals in this case. The accused in Appeals Nos. 24, 25 and 28 of 1977 were convicted for fishing with a trawl net within five fathoms in contravention of Condition 1(a) of the licence. The offence committed under reg. 4(3) of the Fisheries Regulations, 1964 was punishable under reg. 9 of the same Regulations.

The accused in appeal nos. 26 and 27 of 1977 were charged for fishing with a trawl net without a licence in contravention of reg. 4(1)(b) of the said Regulations, an offence under reg. 4(3) and punishable under reg. 9.

The accused appealed, *inter alia*, on the ground that the Magistrate failed to comply with section 173(b) of the Criminal Procedure Code.

Held: (1) there was no proper exercise by the licensing officers of the power which, so far as the court could ascertain had not been vested in them. The purported exercise of their authority in issuing licences was accordingly invalid;

(2) the records of proceedings revealed that there was nothing on the facts recorded in the above appeals which could lead to the conclusion that any of the five appellants was guilty of the offences charged;

(3) there was a failure on the part of the Magistrate to comply with the provisions of section 173(b) of the Criminal Procedure Code.

Cases referred to:-

(1) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.
(2) *Chin Ban Keat* v. *R.* [1949] M.L.J. 297.
(3) *Cheam Gaik Chye* v. *Public Prosecutor* [1967] 1 M.L.J. 52.
(4) *Municipal Commissioners* v. *Chuah Seng & Ors.* (1882) 3 Ky. 140.
(5) *Cheam Gaik Chye* v. *Public Prosecutor* [1967] 1 M.L.J. 51.
(6) *Cheah Yew Fatt* v. *Public Prosecutor* [1960] M.L.J. xlvi.
(7) *R.* v. *Rollafson* [1969] 2 All E.R. 833.
(8) *Sau Soo Kim* v. *Public Prosecutor* [1975] 2 M.L.J. 134.

CRIMINAL APPEALS.

C.T. Wong and *Samson Chin* for the appellants.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

B.T.H. Lee J.: These are five appeals, the accused in three of which namely Appeal Nos. 24/77, 25/77 and 28/77 were convicted in the Magistrate's Court, Tawau, in contravention of Condition 1(a) of the said licence, an offence under Regulation 4 of the Fisheries Regulations, 1964 (hereinafter called "the said Regulations"). The remaining two appeals Nos. 26/77 and 27/77 will be discussed at a later stage.